A **UPMARKET DEVELOPMENT SDN BHD**

v.

SRIERA DEVELOPMENT SDN BHD

B FEDERAL COURT, PUTRAJAYA
ALAUDDIN MOHD SHARIFF PCA
RAUS SHARIF FCJ
ABDULL HAMID EMBONG FCJ
[CIVIL APPEAL NO: 02-16-2010(B)]
C 9 MAY 2011

LAND LAW: *Caveats - Private caveat - Caveat forms - Caveator claiming title and/or interest in respect of a certain portion of land - Whether caveator must expressly state in Form 19B that caveat to bind* D *only that part of land - Whether caveat defective in form and substance - Liberal and progressive approach - Balance of justice - Status quo - National Land Code, s. 322(1)*

In the present appeal by the defendant/appellant, the following E question of law required determination: Whether a caveator – in this instance, the appellant – claiming a title and/or interest in respect of part of a land, who has described the nature of his claim and explained that the caveat applied for was to protect only that part of the land, is further required by s. 322(1) of the F National Land Code ('NLC') to expressly state in Form 19B that the caveat was to bind only that part of the land. It was the respondent's contention that the caveat entered by the appellant was defective in both form (due to the appellant's use of an outdated Form 19B) and substance (it was uncertain whether the G caveat bound the whole land or just a particular interest).

Held (allowing the appeal with costs)
Per Abdull Hamid Embong FCJ delivering the judgment of the court:

H **(1)** In the statutory declaration accompanying the Form 19B (used by the appellant), the appellant had clearly: (i) described in para. 2 (the grounds of the claim) of the Form 19B that his claim was only to protect the affected land *ie*, the overlapping part of the land; and (ii) submitted a plan together I with the Form 19B which plainly identified the land affected. Reading both the form and the statutory declaration together,

this court found that the appellant had substantially complied with the requirements of Form 19B, and that the deviation due to the failure to describe the land in the form itself should not be a ground to invalidate said form. The respondent was neither prejudiced nor misled by the deviation found in the Form 19B used by the appellant; the deviation had no substantial effect. (paras 15 & 16)

(2) A liberal and more progressive approach should be taken in the interpretation of caveat forms. Various statutory provisions under the NLC and the Rules of the High Court 1980 – as well as common sense – supported this liberal interpretative approach. The accompanying statutory declaration may also be looked at in determining the form's actual purport. The form should not, therefore, be viewed in isolation. In this instance, the appellant had candidly admitted that a wrong form (*ie*, the old version) had been used in its application but maintained that substantially there had been conformity with the old form, with which this court agreed. (para 22)

(3) Having determined that the appellant possessed a caveatable interest and that a serious question to be tried was disclosed and after resolving both those questions in the appellant's favour, the courts below should have proceeded to enquire if the balance of justice favoured the caveat remaining on the register pending disposal of the action. In this case, justice called for the preservation of that *status quo* until the trial of the action, and the failure of the courts below to conduct that enquiry amounted to a serious misdirection. (para 25)

(4) In view of the distinctive background facts, the question posed was answered in the negative. (para 27)

[Orders made in the courts below set aside.]

Bahasa Malaysia *Translation Of Headnotes*

Dalam rayuan semasa oleh defendan/perayu, soalan undang-undang yang berikut perlu ditentukan: Sama ada pengkaveat – di sini, perayu – yang menuntut hakmilik dan/atau kepentingan berhubungan dengan sebahagian tanah, yang telah menggambarkan bentuk tuntutannya dan menerangkan bahawa kaveat yang dipohon adalah untuk melindungi hanya sebahagian tanah,

diperlukan lagi oleh s. 322(1) Kanun Tanah Negara ('KTN') untuk menyatakan secara khusus di dalam Borang 19B bahawa kaveat tersebut hanya mengikat sebahagian tanah. Ia merupakan penghujahan responden bahawa kaveat yang dimasukkan oleh perayu adalah cacat dalam kedua-dua bentuk (disebabkan responden menggunakan Borang 19B yang lama) dan substans (tidak pasti sama ada kaveat tersebut mengikat keseluruhan tanah atau hanya kepentingan tertentu).

Diputuskan (membenarkan rayuan dengan kos)

Oleh Abdull Hamid Embong HMP menyampaikan penghakiman mahkamah:

(1) Dalam akuan statutori yang disertakan bersama-sama dengan Borang 19B (yang digunakan oleh perayu), perayu telah dengan jelas: (i) menerangkan dalam perenggan 2 (alasan-alasan tuntutan) Borang 19B bahawa tuntutannya hanya untuk melindungi tanah yang terlibat, iaitu, bahagian bertindih tanah tersebut; dan (ii) mengemukakan satu pelan bersama-sama dengan Borang 19B yang jelas mengenalpasti tanah yang terlibat. Membaca kedua-dua borang dan akuan statutori bersama-sama, mahkamah ini mendapati bahawa perayu telah mematuhi keperluan Borang 19B secara substantial, dan bahawa lencongan yang disebabkan oleh kegagalan untuk menerangkan tanah tersebut di dalam borang tidak seharusnya menjadi alasan untuk menjadikan borang itu tidak sah. Responden tidak diprejudiskan atau diperdaya oleh lencongan dalam Borang 19B yang digunakan oleh perayu; lencongan tersebut tidak mempunyai apa-apa kesan yang substantial.

(2) Suatu pendekatan yang liberal dan progresif sepatutnya digunakan dalam pentafsiran borang-borang kaveat. Beberapa peruntukan statutori di bawah KTN dan Kaedah-Kaedah Mahkamah Tinggi 1980 – dan juga penggunaan akal – menyokong pendekatan tafsiran yang liberal ini. Akuan statutori yang disertakan bersama boleh juga dibaca untuk menentukan maksud sebenar borang tersebut. Oleh itu, borang tersebut tidak seharusnya dipandang secara berasingan. Dalam kes ini, perayu telah mengaku terus terang bahawa suatu borang yang salah (iaitu, versi yang lama) telah digunakan dalam rayuannya tetapi mengekalkan bahawa terdapat keakuran secara substantial dengan borang lama, dengan mana mahkamah ini bersetuju.

(3) Setelah memutuskan bahawa perayu mempunyai kepentingan berkaveat dan bahawa soalan serius untuk dibicara telah dikemukakan dan selepas menyelesaikan kedua-dua soalan tersebut memihak kepada perayu, mahkamah-mahkamah bawahan sepatutnya meneruskan menyiasat jika imbangan keadilan menyokong kaveat dikekalkan dalam buku daftar sehingga tindakan diselesaikan. Dalam kes semasa, ia merupakan adil untuk mengekalkan *status quo* sehingga perbicaraan tindakan tersebut, dan kegagalan mahkamah-mahkamah bawahan untuk menjalankan siasatan tersebut adalah suatu salah arahan yang serius.

(4) Memandangkan fakta-fakta latarbelakang yang tersendiri, soalan yang dikemukakan dijawab secara negatif.

[Arahan-arahan yang dibuat dalam mahkamah bawahan diketepikan.]

Case(s) referred to:

Chor Phaik Har v. Farlim Properties Sdn Bhd [1997] 4 CLJ 393 FC ***(refd)***

Eng Mee Yong & Ors v. Letchumanan [1979] 1 LNS 18 PC ***(refd)***

HSBC Bank Malaysia Bhd v. Asia Transport Service (M) Sdn Bhd [2001] 5 CLJ 346 HC ***(refd)***

Infra Elite Development Sdn Bhd v. Pacific Treasure Land Sdn Bhd [2002] 4 CLJ 633 HC ***(refd)***

Murugappa Chettiar Lakshmanan (Wasi Tunggal Harta Pesaka M.R.L. Murugappa Chettiar, Simati) v. Lee Teck Mook [1995] 2 CLJ 545 CA ***(refd)***

N Vangedaselam v. Mahadevan & Anor [1976] 1 LNS 80 FC ***(refd)***

Syarikat Kewangan Melayu Raya Bhd v. Malayan Banking Bhd [1984] 1 CLJ 78; [1984] 1 CLJ (Rep) 363 FC ***(refd)***

Tan Heng Poh v. Tan Boon Thong & Ors [1992] 1 CLJ 316 (Rep); [1992] 3 CLJ 1340 SC ***(refd)***

Legislation referred to:

Interpretation Acts 1948 and 1967, s. 62

National Land Code, ss. 207, 322(1), (2), 323(1), (3)(c), 327(1)

Rules of the High Court 1980, O. 2 r. 3

For the appellant - Dato' WSW Davidson (S Selvaraj, Chan Yew Hoong & M Nagaletchimy with him); M/s Fernandez & Selvarajah

For the respondent - Jenny Lee (Masitah Alias with him); M/s Hazidin & Chan

[Appeal from Court of Appeal; Civil Appeal No: B-02-897-2007]

[Editor's note: For the Court of Appeal judgment, please see Upmarket Development Sdn Bhd v. Sriera Development Sdn Bhd [2010] 6 CLJ 770.]

Reported by Suresh Nathan

A

JUDGMENT

Abdull Hamid Embong FCJ:

[1] Two questions of law were posed for our determination, namely:

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(a) Whether a boundary dispute over a portion of the land between two neighbouring lots which involves the physical aspect of the land ie, the actual size and not the ownership, rights, title or interest registrable in the document of title, can give rise to a caveatable interest.

C

(b) Whether a caveator who is claiming a title and/or interest in respect of a part of a land:

D

(i) who has described the nature of his claim;

(ii) who has explained that the caveat applied for was to protect only that part of the land.

is further required by s. 322(1) of the National Land Code 1965 to expressly state in Form 19B that the caveat was to bind only that part of the land.

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[2] Background Facts

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2.1 The defendant (the appellant in the present appeal) was the registered proprietor of several pieces of land which was derived from the subdivision of a larger lot known as Lot No. 16245, Mukim Petaling, Daerah Kuala Lumpur.

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2.2 The appellant's land adjoined Lot PT 5105 whose proprietor was Zuhrah Bina Sdn Bhd ("Zuhrah Bina"), a construction firm. Zuhrah Bina had entered into a joint venture agreement with the plaintiff (the respondent herein), a housing developer, to develop Lot PT 5105 into a housing estate.

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2.3 The appellant alleged that the respondent had obtained a development order from the relevant authority based on the title of Lot PT 5105, a provisional title which had not been properly surveyed to define its exact boundary. The boundary of Lot PT 5105 as shown in the plan annexed to the title had overlapped with a portion of the appellant's land.

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2.4 The respondent however began development on Lot PT 5105 relying on the demarcation of boundary in the provisional title to demarcate its area of development. It had laid sewage pipes, constructed manholes and driven concrete piles on the portion claimed by the appellant.

2.5 To protect its interest pending the resolution of the dispute by the court, the appellant lodged a caveat on Lot PT 5105 ie, a caveat against the whole of the respondent's land.

[3] Findings In The High Court

3.1 At the High Court, the respondent applied under s. 327(1) of the National Land Code (NLC) to remove the caveat as a person aggrieved by the existence of the caveat by reason of its interest in the land under the joint venture agreement it had entered into with Zuhrah Bina.

3.2 The main issues for the determination of the High Court were pertaining to the locus of the respondent to make the application to remove the caveat entered by the appellant on the land and whether the question of the overlap of the boundary between the appellant's land and the land on which the respondent carried out the construction work gave the appellant a caveatable interest to lodge a caveat on the said land.

The High Court allowed the respondent's application to remove the caveat without adverting to the issue of the overlapping boundary.

Findings In the Court of Appeal

[4] At the Court of Appeal, the appellant's appeal was dismissed on the ground that the appellant's Form 19B was defective since the appellant had failed to express in that form that the caveat was to bind only the small portion of Lot PT 5105 which overlapped the appellant's lots. ie, the portion on which the appellant claimed an interest. The Court of Appeal found that:

> We have examined From 19B which the Appellant submitted with care. We are convinced that while the Appellant had described the nature of its claim by identifying clearly the lots affected by the overlapping and had explained that the caveat applied for on Lot

A PT 5105 was to protect the overlapped portion, it failed to "express" therein that the caveat was to bind only that small portion of Lot PT 5105 which overlapped the Appellant's lots. By failing to do so, it is clear that the Appellant had caveated that portion of the Respondent's land which it had no caveatable interest.

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[5] That the appellant has a caveatable interest is not in dispute. Indeed the Court of Appeal had found so. As such Question 1 as posed need not be answered since by consent of both parties it is now not in issue.

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[6] In dismissing the appellant's appeal the Court of Appeal had relied on *Tan Heng Poh v. Tan Boon Thong & Ors* [1992] 1 CLJ 316 (Rep); [1992] 3 CLJ 1340 where the Supreme Court held that "the registrar is now prevented from entering a caveat
D whether expressly intended to bind the land or merely a particular interest therein, if the caveator's claim under 323(1) relates to only part of the land".

[7] This case was decided on the then existing s. 322(1) NLC
E (covering the period 1985-2001 *vide* A 587/84) which we now quote:

322. Nature and effect of private caveats

(1) A caveat under this section shall be known as a 'private
F caveat', and:

(a) May be entered by the Registrar on the register document of title to any land at the instance of any of the persons or bodies specified in section 323;

G (b) Shall have the effect specified in sub-section (2) or (3), accordingly as it is expressed to bind the land itself or an undivided share in the land are merely a particular interest therein.

Provided that such a caveat shall not be capable of being
H **entered in respect of part of the land.**

The proviso to that section which we underscored was inserted on 25 March 1985 (*vide* A. 587/84) pursuant to the leading Federal Court case of *N Vangedaselam v. Mahadevan & Anor*
I [1976] 1 LNS 80 where Suffian LP made the following observation on the constraint on a caveator under s. 322(1) NLC

(prior to the first amendment *vide* A 587/84). What the Lord President observed is, in our view, a precursor of the present position of the law. He said this:

> I am of the opinion that under that code [the NLC] also, you either caveat the whole land or not at all, and that if you claim a registrable interest in a portion you may caveat the whole land, provided that you expressly limit the effect of your caveat to protect only your claim.

And the learned Lord President further explained:

> must according to sub-section (2) of section 323 apply by Form 19B. In that form (verified by a statutory declaration) he must specify the nature of the claim on which his application is based and whether the caveat is to be expressed to bind the land itself or a particular interest only …
>
> A caveat is not final and conclusive, that it is like an interim injunction and its purpose is only to preserve the *status quo* pending the taking of steps by the caveator to enforce his claim …

[8] A caveat thus resembles an equitable remedy.

[9] In *Tan Heng Poh* the Supreme Court opined that *Vangedaselam*'s case correctly applied the law as it then stood under s. 322(1) NLC.

[10] *Tan Heng Poh* was critically analysed by the Federal Court in *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1997] 4 CLJ 393, which came to the finding that the proviso of s. 322(1) NLC is purely declaratory of the principles enunciated in *Vangedasalam* and not to nullify that judgment and went on to hold that:

> The proviso to s. 322(1) prohibits the entry of a caveat over part of the land, but says nothing about the validity of a caveat over the whole land which is limited to protect a registrable interest in a portion thereof. The proviso must be read having regard to the section itself and the Code as a whole. *To say that the proviso prohibits a caveat to protect an interest in part of the land would mean that dealings in part of the land, which are permitted under the Code, would not be capable of being protected by caveat.* (emphasis added)

The Federal Court then held that the remarks of Azmi SCJ in *Tan Heng Poh* stating that the only reasonable interpretation to the then proviso in s. 322(1) NLC is to prevent the registrar from

A entering a caveat if the caveator's claims an interest under s. 322(1) relates only to part of the land, as mere *obiter dicta*, which was thus not followed.

[11] The principle of *Farlim* and *N Vangedaselam* is now settled
B law. It has since been legislated in the form of the current proviso to s. 322 NLC *vide* A 1104/2001 and it says:

> Provided that where the claim is in respect of a part of the land, the caveat binds the whole land and where the claim is in respect of an undivided share of the land, the caveat binds the whole of
C the undivided share in the land.

[12] A caveat must thus bind the whole land itself and applying that principle to the facts here, the appellant would have to caveat Lot 5105 itself which included those portion in the land on
D which the appellant had no caveatable interest, in order to protect its (appellant's) interest in the overlapping portion of the land.

Issues And Submissions

[13] The respondent's contention was that the caveat entered by
E the appellant was defective in both form and substance. In form because the appellant had used an outdated Form 19B which has now been superseded by the current form provided under Act A1104/01. The form used did not include para. 3(c) of s. 323 NLC which states:

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> (c) if relating to a part of the land, a description or a plan of the land affected, or if relating to an undivided share in the land or part thereof, a description thereof.

And in substance because the appellant had failed to delete either
G of the descriptive word found in Form 19B, ie, "tanah sendiri/ kepentingan", which omission resulted in creating an uncertainty in the nature of the caveat ie, whether one binding the land or just a particular interest. As such the effect of the caveat cannot be defined as required under s. 322(2) NLC. Backing this proposition
H the respondent relied on *HSBC Bank Malaysia Bhd v. Asia Transport Service (M) Sdn Bhd* [2001] 5 CLJ 346 and in particular, this passage was read to us:

> It was imperative for the Defendant to have stated in the Form
I 19B, by deleting either 'sendiri' or 'kepentingan yang tersebut dalam jadual itu', his intention that the caveat is to bind the land itself or merely a particular interest in the land.

It was also argued that the appellant had typed out the word 'semua' instead of 'sebahagian' in the 4th column of the Schedule in Form 19B, although the appellant was concerned only with a small portion of the respondent's land ie, the overlapping boundary area. This has thus caused a confusion to the public at large and to the respondent as to the true purport of the said caveat. Thus the appellant was in breach of s. 322(2) NLC.

[14] These defects, it was submitted is therefore fatal causing the caveat to be defective (*Infra Elite Development Sdn Bhd v. Pacific Treasure Land Sdn Bhd* [2002] 4 CLJ 633). This ineffectual caveat cannot thus be maintained; it has prejudiced the respondent and must be removed.

Analysis

[15] We have carefully perused the Form 19B used by the appellant as well as the statutory declaration accompanying it. In the statutory declaration the appellant had clearly:

(i) described in para. 2 (the grounds of claim) in Form 19B that his claim was only to protect the affected land ie, overlapping part of the land; and

(ii) submitted a plan together with the Form 19B which clearly identified the land affected ie, the overlapping part of the land. (the overlapping part of the land was highlighted in the plan).

[16] Reading both the form and statutory declaration together, we find that the appellant had substantially complied with the requirements of Form 19B, and that the deviation due to the failure to describe the land in the form itself should not be a ground to invalidate the form. In our considered view, the respondent was neither prejudiced nor misled by the deviation found in the Form 19B used by the appellant here. The deviation has no substantial effect. (see *Sykt Kewangan Melayu Raya Bhd v Malayan Banking Bhd* [1984] 1 CLJ 78; [1984] 1 CLJ (Rep) 363).

[17] Section 62 of the Interpretation Acts 1948 and 1967 also provides that usage of a form that deviates from any prescribed form shall not be invalidated by reason only of the deviation if the deviation has no 'substantial effect and is not calculated to mislead'. Which is the state of the appellant's Form 19B as we found it.

[18] The doctrine of substantial compliance is also embodied in s. 207 NLC which, although concerning instruments of dealing, may also be applicable to a caveat situation especially in respect of usage of a prescribed form such as Form 19B. The proviso to s. 207 NLC states:

> Provided that the form so specified for any dealing may, so long as the variation is not in a matter of substance, be used in any particular case with such adaptations, alterations or additions as may be rendered necessary by the character of the parties or other circumstances of the case.

[19] Under the Rules of the High Court, the court may disallow a preliminary objection on the ground of non-compliance of the rules of court if such non compliance has not occasioned a substantial miscarriage of justice (see O. 2 r. 3 RHC). It emphasises the principle that justice shall not be defeated by a failure to comply with a rule of procedure or forms.

[20] The courts have drawn a close analogy between caveats under the Torrens System and a statutory injunction of an interlocutory nature. The corollary is that caveats are available in appropriate cases for the interim protection of the rights in title to land or interest, alleged by the caveator but not yet proven (see *Eng Mee Yong & Ors. v. Letchumanan* [1979] 1 LNS 18). The only difference is that in caveats it is issued *ex parte* by the registrar in his administrative capacity. Since an interlocutory injunction is an equitable remedy it would seem inappropriate to apply a rigid and ritualistic approach to caveats. A better approach, as suggested by learned counsel of the appellant and with whom we agree, is the 'in the best interest of justice' approach as taken in Australia and New Zealand, under which the Torrens System also operates.

[21] Case laws from both those countries have held that substantial compliance with the relevant form is sufficient and that 'a slavish adherence to prescribed form was not required' as can be discerned from this passage in the book *'Caveats Against Dealings in Australia and New Zealand'* by Shannon Lindsay which equally describes the legal position in our country:

> In most jurisdictions a caveat must be in the form as set out in the legislation or in a prescribed or approved form. It has been held in both Australia and New Zealand that substantial compliance with the relevant form is sufficient. In *Investment &*

Merchant Finance Corp Ltd v. Kirkwood Estates Ltd Ward J considered that use of the prescribed form was not mandatory. In *Hazelwood v. BP Australia Ltd* Cox J commented, in relation to the form of caveat prescribed in Tasmania, which contemplates that the details of the caveator's claim will be set out in columns, that the mere failure to complete these columns was not fatal where the information was clearly stated on the face of the caveat. A similar view has been taken in New Zealand. In *New Zealand Mortgage Guarantee Co Ltd v. Pye*, Vautier J held that slavish adherence to the prescribed form was not required.

It should be also noted that in addition to the provisions found in the Torrens title legislation in some jurisdictions to the effect that a variation from a prescribed form which is not a matter of substance does not affect the validity of the form, there is legislation in all of the Australian jurisdictions providing that strict compliance with prescribed forms is unnecessary. The precise wording of the legislative provision varies, but generally they provide that substantial compliance is adequate.

[22] We are of the view that a liberal and more progressive approach should be taken in the interpretation of caveat forms. The various statutory provisions under the NLC and the RHC which we earlier referred to support this liberal interpretive approach. We may add that even a common sense approach would bring the same conclusion. The accompanying statutory declaration may also be looked at in determining the form's actual purport. The form should not therefore be viewed in isolation. The court should place more weight to the substance rather than form. Dato Davidson of counsel for the appellant had candidly admitted that a wrong form (ie, the old version) had been used in the appellant's application but maintained that substantially there had been conformity with the old form. We agree with him.

[23] Next, we remind ourselves that a caveat is neither final nor conclusive. It is in essence a temporary equitable remedy, just like an interim injunction, provided to maintain the *status quo* of the parties. As such, the balance of convenience factor should be considered and determined upon any application for its removal. The courts below have failed to give any consideration to the balance of convenience (balance of justice) test in removing the appellant's caveat, as formulated in *Murugappa Chettiar Lakshmanan (Wasi Tunggal Pesaka M.R.L. Murugappa Chettiar, Simati) v. Lee Teck Mook* [1995] 2 CLJ 545.

[24] We hold that this failure amounts to a serious misdirection on the part of both courts below. In that case it was held that:

> In order to sustain a caveat, a caveator must first pass through three stages: (i) whether he has disclosed a caveatable interest in his application under 323(1) of the Code; (ii) if he has established a caveatable interest, then, whether the evidence produced in support of his claim discloses a serious question to be tried; and (iii) if both questions are resolved in the caveator's favour, then whether the balance of convenience or justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

[25] Having determined that the appellant possesses a caveatable interest and that a serious question to be tried is disclosed, (ie, that the claim is neither frivolous nor vexatious) and after resolving both those questions in the appellant's favour, the courts below should have proceeded to enquire if the balance of justice favours the caveat remaining on the register pending disposal of the action. In apt cases, justice calls for the preservation of that *status quo* until the trial of the action. In our view this is such a case. A failure to conduct that enquiry has been held to amount to a misdirection. Lord Diplock in his opinion in *Eng Mee Yong*'s case made this observation on such a misdirection:

> This may be why in the Malaysian cases about applications under section 327 to which their Lordships have been referred there does not appear to have been any reference to balance of convenience. They are concerned with what, if anything, the caveator has to prove in order to resist the caveatee's application for removal of the caveat. In the instant case too the learned High Court judge never reached the question of the balance of convenience.

[26] Further, the balance of justice consideration is reinforced by the phrase "the court may make such order on the application as it may think just" found in s. 327(1) NLC itself.

[27] In view of the distinctive background facts we therefore say no in answer to the second question posed.

[28] For these reasons, this appeal is allowed with costs to the appellant. The orders made in the courts below are set aside.